specific intent requirement in an aggravated felony murder case." App. 30a. In reaching that result, as the dissent below noted, the panel majority "essentially eviscerated the power of the Ohio Supreme Court to interpret its own statutes." *Id.* at 52a.

The lower court's willingness to grant habeas relief based on its own redetermination of state law issues irreconcilably conflicts both with the habeas principles articulated by this Court, and with the holdings of the other circuits. Moreover, it dramatically, and improperly, increases the scope of federal court involvement in state criminal law issues. Either of these factors alone warrants certiorari, or perhaps even summary reversal; together the need for review and correction is stark.

Second, the panel's ineffective-assistance-of-counsel analysis directly conflicts with AEDPA's analytical framework and the Court's decisions applying that framework in two distinct ways. First, the court below failed to recognize that federal courts presented with an ineffective assistance claim in habeas cannot simply undertake their own independent analysis under *Strickland v. Washington*, 466 U.S. 668 (1984). Rather, the *only* question is whether the state court applied *Strickland* in an "objectively unreasonable manner." And, second, in making that determination, the federal court must look only to the factual record before the state court at the time it decided. Here the panel ignored each of these limitations. It did not even attempt to parse the state court's analysis and apply the required standard. Rather the panel essentially treated the claim as if it were on direct review, rather than habeas, and conducted its own independent *Strickland* analysis. Indeed, the only passing nod it made to AEDPA was when, after having independently concluded that a *Strickland* violation occurred, the panel inserted a single sentence in two places in its opinion that "the state court's conclusion to the contrary was unreasonable." App. 45a, 61a. And even that nod was an

afterthought at best—the court added one of the two to the opinion only after Ohio filed for rehearing on the original decision. Moreover, in finding a *Strickland* violation, it expressly relied on facts that had not been presented to the state courts.

In sum, the panel improperly collapsed the standards for direct review and habeas review of ineffective assistance claims. As virtually every habeas petition includes at least one claim of ineffective assistance, this newly-minted approach to such claims portends potentially disastrous consequences for the finality of state criminal convictions, thereby undermining the important federalism notions that habeas generally, and AEDPA in particular, are designed to protect.

The lower court's analysis on each of these issues was so deeply flawed that Ohio respectfully suggests that summary reversal may be warranted. In the alternative, Ohio urges the Court to accept review to prevent this flawed framework from further permeating habeas jurisprudence.

STATEMENT OF THE CASE

A. Kenneth Richey killed two-year-old Cynthia Collins during his attempt to kill his ex-girlfriend.

In 1987, an Ohio court convicted Kenneth Richey of aggravated murder. The court determined that he killed two-year-old Cynthia Collins by setting ablaze the apartment where she lay sleeping, and that he did so in an attempt to kill his ex-girlfriend and her new boyfriend who were asleep in the apartment below.

The fire in the Collins's apartment began at about 4:15 a.m. on June 30, 1986. At the time, Richey was the only person there other than two-year-old Cynthia, who was asleep in a bedroom. Cynthia's mother had left with a friend when Richey agreed to watch Cynthia.

Based on their investigation of the blaze, the police determined that Richey started the fire, and that he did so in order to kill either his ex-girlfriend, her new lover, or both. The burn patterns showed that an accelerant had been used in the Collins's apartment to start the fire. And multiple witnesses from a party at the apartment complex that Richey had attended earlier that evening told police that Richey had expressly threatened to burn the building down.

According to these witnesses, Richey was very upset that his ex-girlfriend was at the party with a new boyfriend. One witness related that Richey said "If I can't have her [referring to Richey's ex-girlfriend], nobody else can." App. 236a. Three others testified that Richey said he would burn down the "A Building"—the building in the complex in which his girlfriend lived. According to one, Richey said "Before the night is over, part of A Building is going to burn down." *Id.* at 237a.

While watching firefighters fight the blaze, Richey confirmed his role in the fire. He asked his former girlfriend, who had also fled to the parking lot outside, if the fire had scared her. When she said yes, Richey told her "if he couldn't have [her], that nobody would." *Id.* at 238a. Another witness also testified that as Richey stood casually drinking a can of beer and watching the flames, he laughed and said "It looks like I did a helluva good job, don't it." *Id.*

B. A state court three-judge panel convicted Richey and sentenced him to death.

Based on this evidence, a grand jury indicted Richey for aggravated murder. The indictment specified that Richey had committed the aggravated murder in the course of committing arson—a capital offense under Ohio law. See O.R.C. §§ 2903.01 & 2929.02. The indictment further charged Richey with aggravated arson, breaking and entering, involuntary manslaughter, and child endangering.

Richey waived his right to a jury trial, and the trial proceeded before a three-judge panel. (Ohio law requires three-judge panels for bench trials involving a capital charge. See O.R.C. § 2929.03(C)(2)(b).) Richey did not testify at trial, but his attorneys argued that that there was insufficient evidence linking Richey to the fire. At the end of the trial, however, the three-judge panel unanimously convicted him on all counts of the indictment (except the manslaughter count that was a separately-charged lesser included offense to the felony murder count). After a separate sentencing hearing at which Richey presented mitigation evidence, the panel unanimously imposed the death penalty.

C. Richey litigated his sufficiency-of-the-evidence claim on the merits in state court during direct appeal.

The Ohio Supreme Court affirmed Richey's conviction on direct appeal. While Richey advanced some twenty-three claims of error, he did not argue that Ohio law did not allow "transferred intent" in felony murder cases. That is, Richey did not directly raise the issue on which the court below relied in granting him habeas relief. The Ohio Supreme Court did, however, rule on the issue of transferred intent in the course of rejecting Richey's claim that the evidence at trial was insufficient to support his conviction.

In particular, the court expressly found that transferred intent was "firmly rooted in Ohio law." According to the court, it was immaterial that Richey had intended to kill his ex-girlfriend, rather than two-year-old Cynthia, who actually died in the blaze:

> The fact that the intended victims escaped harm, and that an innocent child, Cynthia Collins, was killed instead, does not alter Richey's legal and moral responsibility. "The doctrine of transferred intent is firmly rooted in Ohio law." *State v. Sowell* (1988), 39 Ohio St.3d 322, 332. Very simply, "the culpability of a scheme designed to

> implement the calculated decision to kill is not altered by the fact that the scheme is directed at someone other than the actual victim." *State v. Solomon* (1981), 66 Ohio St.2d 214, 218.

App. 250a. Indeed, as the court also noted, the use of transferred intent in Ohio criminal law went back over a century. See *id.* at 251a (citing *Wareham v. State*, 25 Ohio St. 601, 607 (1874)). And further solidifying this conclusion, the court noted the "singular unanimity" among the States on the question of whether transferred intent would suffice to support a murder conviction. *Id.* at 251a (quoting *Gladden v. State*, 330 A.2d 176, 181 (Md. 1974)).

Finding that the evidence of Richey's guilt was overwhelming, the court rejected all of Richey's challenges to his conviction. The court then separately addressed, and rejected, Richey's challenges to his death sentence. As the court noted, "Richey killed a defenseless child, whose safety had been entrusted to him, as a result of a blind, jealous rage directed at his ex-girlfriend and her current lover." App. 262a. Accordingly, it concluded "[t]he death penalty is appropriate and proportionate when compared with similar felony murder cases." *Id.* at 263a.

D. Richey litigated his ineffective-assistance-of-trial-counsel claim during his post-conviction litigation.

Richey then filed a state post-conviction petition that raised several claims of ineffective assistance of trial counsel. The trial judge rejected those claims. Of particular importance here, the claims included a claim that Richey's attorney provided ineffective assistance with regard to his handling of the fire expert he retained to help prepare Richey's defense. In rejecting that claim, the state court expressly found (1) that Richey had not argued that his expert was unqualified, (2) that in any event Richey's expert was qualified, and (3) that Richey's trial counsel acted reasonably in relying on the expert. *Id.* at 347a–49a. Richey appealed,

and Ohio's Third Appellate District affirmed the trial court's rejection of the claims. Richey further appealed to the Ohio Supreme Court, which declined to accept the case for discretionary review.

E. The district court rejected Richey's sufficiency-of-the-evidence and ineffective-assistance-of-trial-counsel claims.

Richey then filed a habeas petition in the Northern District of Ohio advancing twenty-seven grounds for relief. The district court rejected the petition, and, in doing so, specifically considered, and rejected, the two grounds on which the Sixth Circuit relied below in vacating Richey's conviction. In rejecting the first of the two—the insufficiency-of-evidence claim—the district court found that Richey's claim was procedurally defaulted because he failed to raise it at trial or on direct appeal. *Id.* at 129a–32a; 150a–52a (specifically barring the transferred intent argument). The court also held that Richey's claim was based on a point of purely state law—namely, whether Ohio law permitted application of the transferred intent doctrine in a case of felony aggravated murder—which was not cognizable in a habeas corpus proceeding. *Id.* at 131a. Finally, the court concluded that even if Richey had preserved a cognizable claim for review, it lacked merit because "Richey cannot argue persuasively that Ohio has abandoned the transferred intent theory when the Ohio Supreme Court explicitly stated in his case that it has not." *Id.* at 132a.

The court likewise rejected the ineffective assistance claim. The court found that while defense counsel's failure to investigate can constitute ineffective assistance of counsel, *id.* at 193a–94a (citing *Williams v. Taylor*, 529 U.S. 1362 (2000)), "no court has determined that once counsel undertakes an adequate investigation, any disfavorable results constitutionally require further investigation," *id.* at 194a. The court concluded that "counsel's conduct in hiring

DuBois and accepting his report was not objectively unreasonable." *Id.*

F. In a 2-1 decision, the Sixth Circuit reversed the district court and vacated Richey's conviction.

In a 2-1 decision, the Sixth Circuit reversed the district court decision and granted Richey habeas relief, vacating his aggravated murder conviction. The court relied on two separate grounds to reach this result.

First, the panel majority rejected the Ohio Supreme Court's reading of Ohio law as to whether the State could rely on transferred intent to satisfy the intent element of aggravated murder under O.R.C. § 2903.01(B). While recognizing that the Ohio Supreme Court opinion had expressly said that the State *could* do so, the panel said that in habeas the State could not simply "rel[y] on the Ohio Supreme Court's pronouncement in Richey's case to support its interpretation of what elements [the State] needed to prove."[1] App. 26a.

The panel majority instead undertook its *own* analysis of Ohio law and determined that transferred intent was *not*

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[1] The Sixth Circuit seemed to recognize that this was a question of state law. After oral argument, a divided court issued an order certifying a question regarding transferred intent to the Ohio Supreme Court. The majority declared that it was "uncertain as to how Ohio defined the intent element of aggravated felony murder at the time of the offense." App. 220a. So the majority certified the following question: "As provided by O.R.C. § 2903.01 in June 1986, is intent to cause the death of someone other than the actual victim sufficient to establish the requisite intent for aggravated felony murder?" *Id.* at 230a. Judge Siler dissented from the Certification Order because he was "of the firm opinion that the Ohio Supreme Court has already spoken on the issue to be certified." *Id.* at 233a. Judge Siler correctly predicted that the Ohio Supreme Court would decline to answer the question as it had already answered it during Richey's direct appeal. *Id.* at 232a. ("I can see no reason for the Ohio Supreme Court to answer our question. As the majority opinion correctly states, on direct appeal that court already decided the certified issue.").

available. In doing so, it looked to the very cases that the Ohio Supreme Court had relied on during Richey's direct appeal in determining that transferred intent *was* available. But, contrary to the Ohio court, the panel majority held that those cases were limited to aggravated murder under O.R.C. § 2903.01(A), and did not apply to aggravated murder under O.R.C. § 2903.01(B), the crime with which Richey was charged. For the latter crime, the court said, transferred intent was not enough.

Having determined that transferred intent was not an available legal theory, the panel majority concluded that there was insufficient evidence to support Richey's murder conviction. In particular, the State's evidence showed that Richey intended to kill his girlfriend (who did not die), not two-year-old Cynthia (who did). Thus, the majority concluded, the State had failed to establish a necessary element of the crime under state law, rendering Richey's conviction constitutionally defective.

Second, the panel held that Richey had received ineffective assistance of trial counsel. Although Richey extensively litigated that claim in state court, the panel did not review the state court analysis. Rather, it undertook an independent, de novo assessment under *Strickland*, and determined that both *Strickland* elements—deficient performance and prejudice—were present. The panel's sole mention of the state court's contrary determination on the ineffective assistance issue consisted of one sentence—"The state court's conclusion to the contrary was unreasonable"—that it placed at the end of its analysis of each prong. Even that sentence was an afterthought, as the majority added the sentence to its prejudice analysis only after Ohio sought rehearing en banc. See App. 61a ("The panel has added the sentence 'The state court's conclusion to [the] contrary is unreasonable' to the paragraph before Part III. Conclusion on page 22 of the opinion.") (order denying rehearing en banc).

Judge Siler vigorously dissented on both holdings. With regard to the first, he opined that the Ohio Supreme Court's determination of the necessary elements of aggravated murder foreclosed the panel's redetermination of that issue. As he noted, by ruling otherwise, the majority "essentially eviscerated the power of the Ohio Supreme Court to interpret its own statutes." *Id.* at 52a. And with regard to the ineffective assistance issue, he noted that, in undertaking a de novo *Strickland* analysis, the majority exceeded the federal court's proper role under AEDPA. Rather, he said, the federal court should have been limited to deciding whether or not the state court's Strickland analysis was "objectively unreasonable." *Id.* at 54a (citing *Williams*, 529 U.S. at 409). Under the proper AEDPA framework, the judge concluded, habeas relief was not warranted on the record here.

Because the majority's opinion on these issues creates important conflicts both with this Court's precedent, and with law from the other circuits, regarding the appropriate scope of federal court review of state criminal convictions under AEDPA, the Warden now respectfully requests certiorari review.

REASONS FOR GRANTING THE PETITION

A. The decision below conflicts with the Court's precedent and opinions in four other circuits, which recognize that a federal habeas court cannot reject a state supreme court's determination of a matter of state law.

The court below rejected the Ohio Supreme Court's determination regarding the elements of aggravated murder under Ohio law. In doing so, the opinion creates a sharp break both with authority from this Court and the uniform opinion of four other circuits regarding the extent to which federal courts can rest habeas relief on alleged errors in state law. Indeed, as described below, the decision here so clearly

conflicts with settled law that summary reversal may well be appropriate.

1. The Court itself has "stated many times that federal habeas corpus relief does not lie for errors of state law." *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (quotation marks omitted); see also *Pulley v. Harris*, 465 U.S. 37, 41 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law."). And in doing so, the Court has "reemphasize[d] that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle*, 502 U.S. at 67–68. Indeed, the Court has expressly rejected the argument that "the [state supreme court's] construction of state law should not be deemed binding on [the] Court" in habeas actions. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). "[S]tate courts," the Court said, "are the ultimate expositors of state law, and [federal courts] are bound by their constructions." *Id.* (citation omitted).

The Court's case law strongly suggests that determining the elements of a state law crime is one such issue of state law. In *Engle v. Isaac*, 456 U.S. 107, 119 (1982), the habeas petitioners argued that Ohio had "implicitly designated absence of self-defense an element of the crimes charged against them," and that the State should thus have been required to prove "absence of self-defense" beyond a reasonable doubt. The Court rejected that claim, finding that it sounded only in state law, and thus could not provide the basis for habeas relief: "While they attempt to cast their first claim in constitutional terms, we believe that this claim does no more than suggest that the instructions at respondents' trials may have violated state law." *Id.* at 120–21. In short, state law determines what the elements of a crime are, and federal courts lack the power to adjudicate such questions in habeas.

2. The circuit courts, other than the one below, have clearly understood the Court's jurisprudence in that regard. The circuit courts to consider the issue have uniformly concluded that state law defines the elements of a crime, and that the power to define the elements includes defining what legal theories the State can rely on in proving that those elements exist.

The Seventh Circuit's decision is *Gilreath v. Hanks*, 1996 U.S. App. Lexis 20340 (7th Cir. Aug. 8, 1996), perhaps demonstrates most clearly the conflict between these other circuits and the decision below. There, the court rejected a habeas claim identical to the one that the court below approved. In *Gilreath*, the petitioner claimed "that Indiana has abolished the doctrine of transferred intent and therefore could not use it in his case." *Id.* at *4. This, the court correctly noted, "is actually a claim that under Indiana law in order to show that a defendant is guilty of murder, the state must prove that the defendant actually killed the person whom he intended to kill." *Id.* at *4–*5. And the Seventh Circuit concluded, unlike the court below, that the state supreme court's opinion on that issue was the final word: "Whether or not we would read the Indiana statute differently is not relevant, for we have no authority to tell the Indiana Supreme Court how to construe Indiana statutes . . . . The Indiana Supreme Court recognizes the doctrine of transferred intent and therefore Gilreath's first claim fails." *Id.* at *6. (citation and quotation marks omitted).

While *Gilreath* is an unreported decision, it undoubtedly represents the Seventh Circuit's view on this issue. As the en banc Seventh Circuit court noted in *Eaglin v. Welborn*, 57 F.3d 496, 501 (7th Cir. 1995), "[a] state is free within extremely broad limits to decide upon the elements of a crime." And state law questions, the en banc court noted, even if wrongly decided, cannot provide the basis for habeas relief: "[I]f there is one fixed star in the confusing jurisprudence of constitutional criminal procedure, it is that a

violation of state law does not violate the Constitution." *Id.* Unfortunately, as described below, that "fixed star" no longer shines in the Sixth Circuit.

The Second Circuit's decision in *Einaugler v. Supreme Court*, 109 F.3d 836 (2d Cir. 1997), further reflects the conflict. There, like here, the petitioner sought relief on sufficiency-of-evidence grounds. He claimed that the State could not convict him without direct expert testimony (he was convicted of reckless endangerment for his conduct as a physician). The court, however, concluded that it "would go far beyond the proper role of this court in considering a writ of habeas corpus to determine that" New York law had a requirement of direct expert testimony for conviction on his charges. *Id.* at 842. According to the court, "[t]o do so would be to use the federal constitution to micromanage the laws of New York State." *Id.*

Moreover, the circuits have repeatedly recognized that a state supreme court's determination of the elements of a state crime is binding on federal courts in habeas. In *Fenske v. Thalacker*, 60 F.3d 478, 480 (8th Cir. 1995), for example, the petitioner challenged his burglary conviction on the grounds that "the evidence at trial was insufficient to establish every essential element of burglary under Iowa law." In rejecting that claim, the court began from the proposition that "[i]t is elementary that state law defines the elements of state-law crimes." *Id.* "It is the task of the [state supreme court], not [the federal court of appeals] to determine and define the scope of the [state] burglary statute." *Id.* And, as the state supreme court had "found that [the petitioner's] conduct fit within the Iowa burglary statute"—just like the Ohio Supreme Court did in Richey's case here—the circuit court said it was "not prepared to give the statute a meaning rejected by that court, as [the petitioner] would have [the court] do." *Id.* at 481.

Other courts agree. See *Davis v. Strack*, 270 F.3d 111, 123 (2d Cir. 2001) ("States are free to define the elements of, and defenses to, crimes."); *id.* at 123 n.4 ("In determining whether a petitioner was entitled to a defense under state law, federal courts must of course defer to state-court interpretations of the state's laws, so long as those interpretations are themselves constitutional."); *Bates v. McCaughtry*, 934 F.2d 99, 102 (7th Cir. 1991) ("A claim that the state court misunderstood the substantive requirements of state law does not raise a claim under § 2254."), *cert. denied*, 502 U.S. 915 (1991); *Stanley v. Jones*, 973 F.2d 680, 682 (8th Cir. 1992) (federal courts should not offer a second opinion on interpretation of state law where the petitioner argued that the state court misinterpreted the elements of the crime), *cert. denied*, 507 U.S. 962 (1993); *Jeffries v. Blodgett*, 5 F.3d 1183, 1194 (9th Cir. 1992) (rejecting claim that the state failed to prove the elements of an aggravating circumstance and deferring to the Washington Supreme Court's interpretation of the elements of the aggravating circumstance). In short, the uniform view as expressed in opinions from the Second, Seventh, Eighth, and Ninth Circuits is that questions regarding how state-law crimes are defined are questions of *state* law, and thus are not a proper basis for habeas relief.

That is not to say that federal habeas courts play no role in these issues. Although determining the elements of a crime is a matter of state law, the federal Constitution places some limits. It requires, for example, proof beyond a reasonable doubt for each element established by state law, see *In re Winship*, 397 U.S. 358 (1970), and mandates jury trial rights for each of them as well, see *Blakely v. Washington*, 542 U.S. 296 (2004). The State's failure to meet either of these requirements would entitle a petitioner to habeas relief. Similarly, a state court's determination of the elements could potentially be so novel or unexpected that it would violate a defendant's due process rights. See, e.g., *Bouie v. City of*

Columbia, 378 U.S. 347, 249–50 (1964). But the important point here is that a habeas petitioner cannot base his claim for relief on the argument that the state courts were wrong *as a matter of state law* as to what elements are required.

3. The decision below cannot be reconciled with the principles articulated above. Here, the Ohio Supreme Court, during Richey's own direct appeal, determined that the doctrine of transferred intent applied: "The fact that the intended victims escaped harm, and that an innocent child, Cynthia Collins, was killed instead, does not alter Richey's legal and moral responsibility." App. 250a. Indeed, the court noted, transferred intent is "firmly rooted" in Ohio law with a historical pedigree extending over 100 years. See *id.* at 250a–51a (citing *Wareham v. State*, 25 Ohio St. 601, 607 (1874) (explaining why transferred intent is an important component of Ohio criminal law)).

Yet, the panel below reached a directly contrary conclusion on the availability of transferred intent—"we must find that the State could not apply transferred intent in order to satisfy the specific intent requirement in an aggravated felony murder case." App. 30a. It reached that result by relying on two state court cases that post-date Richey's conviction—cases that themselves *upheld* murder convictions based on transferred intent—along with its own independent reading of Ohio's aggravated murder statute. In so doing, as the dissent noted, the majority "essentially eviscerated the power of the Ohio Supreme Court to interpret its own statutes." *Id.* at 52a. That result is hardly consistent with AEDPA's command of deference, and would not fly even under pre-AEDPA habeas analysis. *Mullaney*, 421 U.S. at 691 ("This Court . . . repeatedly has held that state courts are the ultimate expositors of state law . . . and that we are bound by their constructions except in extreme circumstances not present here. Accordingly, we accept as binding the [state supreme court's] construction of state homicide law.").

Moreover, as noted above, it creates a sharp conflict with other circuits' handling of this issue.

To be sure, the court tried to buttress its holding by suggesting that the use of transferred intent to support a felony murder conviction under Ohio law would be so novel as to violate due process. See App. 27a–28a (citing *Bouie*, 378 U.S. at 351). But that suggestion does nothing to vitiate the conflict that the decision below creates. This is so for two reasons. First, while the court suggested the *possibility* that allowing transferred intent would be so novel as to create a due process problem, its actual *holding* was that state law rejects the use of transferred intent. That is, the court did not use the "novel interpretation theory" as a basis for granting habeas relief on due process grounds. Rather, it used that theory as an interpretive tool to support its reinterpretation of Ohio law. Essentially, the court said that "the Ohio Supreme Court must not have really meant what it said about transferred intent because, if it had, that interpretation would have violated due process." Thus, at the end of the day, the actual basis for the majority's decision rested on its reinterpretation of Ohio law. Certainly that is how the dissent understood it. See App. 52a (recognizing that the majority had "essentially eviscerated" the power of Ohio courts to decide matters of Ohio law). But in granting relief on those grounds, the court below claimed a power that a host of other circuits have correctly concluded federal courts do not have—the power to overrule the state supreme court regarding what elements the State requires for murder.

Second, the "novel interpretation theory" cannot serve as a viable alternative explanation for the simple reason that it fails to justify the grant of habeas relief. This Court has said that the threshold for unconstitutional "novelty" is very high indeed, see *Mullaney*, *supra*, and that threshold is not met here. As discussed above, the Ohio Supreme Court showed that the doctrine is "firmly rooted" in Ohio law, citing cases going back over 100 years. Thus, it is hardly

surprising that this "firmly rooted" doctrine would apply to felony-murder cases. The two Ohio cases that the court below relied on do not suggest otherwise. The principal case, *State v. Sowell*, 530 N.E.2d 1294 (Ohio 1988), involved a murder conviction under O.R.C. § 2903.01(A), not O.R.C. § 2903.01(B) as in Richey's case. And the court there *upheld* a conviction based on transferred intent. There is nothing in that opinion inconsistent with the use of transferred intent in Richey's case, as evidenced by the fact that the Ohio Supreme Court cited *Sowell* in upholding Richey's conviction. App. 250a. The other case, *State v. Mullins*, 602 N.E.2d 769 (Ohio Ct. App. 1992), is an intermediate appellate court case, hardly the final word on Ohio law, especially when the Ohio Supreme Court has spoken otherwise. And again, its holding was directed to a murder conviction under O.R.C. § 2903.01(A), a conviction it upheld. *Id.* at 772. While the *Mullins* court suggested in dicta that the legislature had *apparently* removed the transferred intent doctrine from aggravated felony murders by enacting O.R.C. § 2903.01(D) (a statutory section dealing with when intent to kill can be inferred from conduct), that point was irrelevant to the court's holding. In any event, the appellate court dicta in a case involving a different crime certainly cannot be a sufficient basis, in and of itself, to show the Ohio Supreme Court's determination in Richey's case was unconstitutionally novel.

The Ohio Supreme Court unequivocally stated that the transferred intent doctrine applied to Richey's offense, and no Ohio court has ever held to the contrary. Thus, even if the court had actually relied on the "novel interpretation theory" as an alternate holding (and it did not), it would still fail to cure the conflict the decision below creates.

The end result is that the panel majority has created a new power for federal courts in habeas—the power to trump state courts *on questions of state law* concerning the elements of the crime. In adopting that approach, the court below has

directly undermined the federalism principles that animate habeas in general and AEDPA in particular. In fact, the approach below so clearly contradicts the principles articulated in *Engle*, *Mullaney* and *Estelle* that Ohio respectfully suggests that summary reversal may be appropriate. At the very least, given the direct conflict between the decision below and the uniform view of circuits across the country, certiorari is warranted. Only this Court can restore the appropriate balance between federal and state courts with regard to state criminal convictions. Ohio urges the Court to do so.

B. The Sixth Circuit's framework for habeas review of ineffective assistance claims conflicts with the Court's precedents.

The alternate basis for the lower court's grant of habeas relief—the claim that Richey received ineffective assistance—further demonstrates the need for review and correction. In fact, the lower court's analysis directly conflicts, in two distinct ways, with this Court's mandates on how to review ineffective assistance claims under AEDPA.

1. First, as the Court has noted, AEDPA's language limits the scope of habeas relief to those occasions where a state court's decision is either "contrary to," or an "unreasonable application of," Supreme Court precedent. And this Court has properly insisted that lower courts abide by this language. The starting point for habeas review, then, must be the state court decision. Federal courts in habeas are not free to independently analyze the claimed error, but rather only to determine whether the state court's analysis violated the applicable standards. The Sixth Circuit's decision here fails to comport with that limitation.

No one disputes that *Strickland* supplies the correct substantive standard for assessing ineffective assistance claims. And the Ohio courts expressly relied on *Strickland* in rejecting the ineffective assistance claims Richey advanced

during his post-conviction proceedings. See, e.g., App. 350a (citing circuit court and state appellate court cases applying *Strickland* to claims of ineffective assistance based on alleged deficiencies in an attorney's interaction with experts). On habeas, then, the court should have limited its reach to determining whether the state court determination on that issue violated the "unreasonable application" prong of 28 U.S.C. § 2254(d)(1). See *Bell v. Cone*, 535 U.S. 685, 698–99 (2002).

Rather than start with the state court decision, though, the panel's analysis began as though this were an ineffective assistance claim on direct appeal, rather than on habeas: "As previously noted, *Strickland* requires that Richey demonstrate both deficient performance and resulting prejudice." App. 39a. The majority then undertook its own independent analysis and found deficient performance and prejudice, again with no reference to the state court's handling of those issues. It concluded that analysis with a perfect summary of its *Strickland* result:

> Accordingly, we find that counsel's incompetent handling of the sole forensic expert in this case fell below the wide range of acceptable professional standards, and that absent counsel's grave mistakes, there is a reasonable probability that the three-judge panel would have at least had a reasonable doubt as to whether Richey set the fire that ultimately caused the death of Cynthia Collins.

Id. at 50a. In short, the court's analysis was indistinguishable from the analysis that would have applied on direct review.

This Court, however, recently reversed a lower court for using that kind of analysis on habeas:

> For Respondent to succeed, however, he must do more than show that he would have

> satisfied *Strickland*'s test if his claim were being analyzed in the first instance, because under §2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. Rather, he must show that the Tennessee Court of Appeals applied *Strickland* to the facts of his case in an objectively unreasonable manner.

Cone, 535 U.S. at 699 (citation omitted); see also *Price v. Vincent*, 538 U.S. 634, 639 (2004) (reversing the Sixth Circuit for reciting the AEDPA standard but then "proceed[ing] to evaluate respondent's claim *de novo* rather than through the lens of §2254(d)"); *Holland v. Jackson*, 124 S. Ct. 2736 (2004); *Williams v. Taylor*, 529 U.S. 362 (2000).

That is exactly the mistake the panel made here. As the dissent below noted, the Sixth Circuit should have been asking only whether the state court had applied *Strickland* in an unreasonable manner, but it failed to limit itself in that way. See App. 54a–55a (citing two recent Supreme Court AEDPA cases on ineffective assistance of trial counsel and noting that the inquiry is whether the Ohio courts unreasonably applied *Strickland*). In fact, somewhat ironically, the *only* place where the panel even discussed the Ohio state court's decision was in the panel's consideration of whether the ineffective assistance claim was procedurally defaulted. And even there, it cited the state court opinion only to reject the state court's reading of state law on whether Richey should have raised his claims on direct appeal rather than in state postconviction proceedings.[2] *Id.* at 38a–39a.

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[2] This is yet more evidence of the Sixth Circuit's failure to comply with AEDPA. State court interpretations of state procedural rules are binding on federal courts in habeas. See, e.g., *Rowell v. Dretke*, 398 F.3d 370, 374–75 (5th Cir. 2005) ("[The habeas petitioner] at essence is arguing that the state court incorrectly interpreted Texas procedural law by finding he defaulted his claim; it is not the role of the federal habeas court

Tellingly, the majority below itself appears to have recognized that it failed to follow AEDPA. In a belated attempt to bring its analysis within AEDPA's scope, the majority responded to Ohio's request for rehearing en banc by modifying its conclusion on the prejudice prong of the ineffective assistance claim (quoted above) by adding one sentence: "The state court's conclusion to [the] contrary was unreasonable." App. 61a. But the belated addition of this language, if anything, further demonstrates that the majority in fact conducted its own *independent* analysis. Merely tacking a passing reference to AEDPA on the tail of that analysis does not magically transform that prohibited "independent judgment," into an AEDPA-compliant review.

2. Second, in determining whether the state court "unreasonably applied" *Strickland*, the court below also violated AEDPA's requirements regarding the treatment of facts. First, the court here made virtually the same mistake that led the Court to summarily reverse the Sixth Circuit in *Holland v. Jackson*, 124 S. Ct. 2736 (2004). There, the Sixth Circuit found "unreasonable application" based on facts that had not been before the state court, but had instead been developed for the first time in federal habeas. In reversing the grant of a writ, the Court unequivocally stated that in determining "unreasonable application," the state court's decision "must be assessed in light of the record the court

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to reexamine state-court determinations of state-law questions."); *Mack v. Caspari*, 92 F.3d 637, 640 (8th Cir. 1996) (challenges to state court's application of state procedural rules are not cognizable in habeas). Here, however, the Sixth Circuit rejected the state court's view that Richey's ineffective assistance claims were procedurally barred as a result of his failure to raise them on direct appeal. The only proper inquiry in habeas should have been whether the state procedural rule *as applied by the state court* served as an adequate and independent state law ground. That is, the court should have focused on whether the state court's interpretation of the procedural rules was firmly established and regularly followed. Instead, the court simply undertook its own de novo reinterpretation of Ohio's procedural law. This was a clear violation of AEDPA's mandates.

had before it." *Id.* at 2737–38. That is, a federal court cannot rely on facts not presented to the state court as a basis for determining that the state court acted unreasonably.

But here, as in *Holland*, the court relied on new facts. The first factor the court cited as a basis for finding deficient performance was that Dubois (the expert counsel hired) was "unqualified for the job." App. 41a. But virtually every fact that the court cited in support of that was developed for the first time during habeas. For example, it was depositions taken in the habeas proceeding that revealed (1) that DuBois worked primarily in another field, (2) that DuBois had worked under the State Fire Marshal and thought very highly of him, (3) that trial counsel "waited two months after he was retained . . . to contact and meet DuBois," *id.* at 41a, and (4) that counsel "limited DuBois's initial investigation to ten hours," *id.* Indeed, in the state court proceedings, Richey affirmatively chose *not* to challenge DuBois's qualifications. Instead, he challenged only the results that DuBois had reached. See *id.* at 350a ("Richey does not allege that Mr. DuBois was not qualified to render an expert opinion."). And none of the information that the Sixth Circuit cited regarding those qualifications was in the record before the state courts. Accordingly, the Sixth Circuit committed clear error in even considering that information as part of assessing whether the state court "unreasonably applied" *Strickland*. See *Holland*, 124 S. Ct. at 2737–38.

This failure is perhaps even more glaring with regard to another "fact" underlying the lower court's opinion. According to the majority below, "counsel failed to thoroughly inform DuBois about a critical problem with the State's scientific evidence—that the carpet had been housed in a garbage dump . . . ." App. 41a. Not only was this "fact" not presented to the state court but *DuBois's own testimony in federal court contradicts it*. According to DuBois, the trial counsel *did* tell him about it:

> But I do recall [Kluge] told me that the carpeting had been thrown out and—I probably misstated whether or not he told me it had been sampled and then thrown in the dumpster or thrown in the dumpster then sampled. But I did know that there was some questionable handling of the carpeting after the fire, and [Kluge] was rather upset about it.

R.105, Dep. of L. Gregory DuBois, 6th Cir. Joint App. at 6334. That is, not only did the Sixth Circuit improperly rely on new facts in its unreasonable application analysis, but at least some of those "facts" were simply wrong.

The points listed above are merely illustrative. Virtually every fact on which the panel majority relied was disputed, and either had been resolved differently in state court, or had not even been presented to the state courts at all. And the key point for purposes of this petition is that the panel majority, in relying on these "facts," did not even purport to apply AEDPA's mandated framework. Certainly, the state court's *Strickland* analysis could not have been "objectively unreasonable" in failing to consider "facts" that Richey did not even present, especially as he makes no effort to show, and could not show, that these facts were unavailable at the time of the state court proceedings. See 28 U.S.C. § 2254(e)(2). Nor did the Sixth Circuit even purport to show that, with regard to the facts the state court did find, there was "clear and convincing evidence" that those factual findings were incorrect. See 28 U.S.C. § 2254(e)(1). The absence of such analysis, in and of itself, reflects the clear conflict between the language of AEDPA and Court's precedent interpreting it on the one hand and the decision below on the other.

Either of the failings above is sufficient, standing alone, to show that the Sixth Circuit erred in granting relief on Richey's ineffective assistance claim. Taken together, Ohio

respectfully suggests that summary reversal is appropriate. At the very least, in concert with the court's resolution of the transferred intent issue—which dramatically expands federal power over state court criminal issues—the court's failure to follow AEDPA's framework in assessing the ineffective assistance claim clearly demonstrates the need for immediate review and correction.

AEDPA, properly applied, respects the strong federalism interests at stake when federal courts review state court criminal convictions. The decision below, in failing to follow that framework, unsettled that balance and created conflict among the circuits that urgently calls for review. Ohio respectfully requests that the Court accept this case to address that conflict and to prevent the federal encroachment on state court criminal convictions that the opinion invites.

CONCLUSION

For all of the above reasons, Ohio urges the Court to grant the State's petition and reverse the Sixth Circuit's decision.

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July 14, 2005

Supreme Court, U.S.
FILED

05-101 JUL 14 2005

OFFICE OF THE CLERK

No. _____

In The Supreme Court Of The United States

MARGARET BRADSHAW, Warden,

Petitioner,

v.

KENNETH T. RICHEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES COURT OF
APPEALS FOR THE SIXTH
CIRCUIT

No. 01-3477

KENNETH T. RICHEY,
Petitioner-Appellant,
v.
BETTY MITCHELL,
Warden, Respondent-Appellee.

395 F.3d 660

May 7, 2003, Argued
January 25, 2005, Decided
January 25, 2005, Filed

ARGUED: Paul E. Nemser, GOODWIN PROCTER LLP, Boston, Massachusetts, for Appellant.
Michael L. Collyer, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Cleveland, Ohio, for Appellee.
ON BRIEF: Paul E. Nemser, Kenneth J. Parsigian, GOODWIN PROCTER LLP, Boston, Massachusetts, for Appellant. Michael L. Collyer, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Cleveland, Ohio, for Appellee.
John J.P. Howley, KAYE SCHOLER LLP, New York, New York, for Amicus Curiae.

Before: SILER, DAUGHTREY, and COLE, Circuit Judges. COLE, J., delivered the opinion of the court, in which DAUGHTREY, J., joined. SILER, J., delivered a separate dissenting opinion.

R. GUY COLE, JR., Circuit Judge. Kenneth T. Richey was arrested, convicted, and sentenced to be executed for intentionally starting an apartment fire that killed two-year-old Cynthia Collins. He continues to maintain his innocence. Following a series of unsuccessful appeals in the Ohio state courts, Richey petitioned the district court for a writ of habeas corpus, and the court denied his request. Richey now appeals this decision. Because constitutional errors have undermined our confidence in the reliability of Richey's conviction and sentence, we REVERSE the decision below.

I. BACKGROUND

On June 30, 1986, at approximately 4:15 a.m., a fire started in the second-floor apartment of Hope Collins, who was elsewhere at the time. Her two-year-old daughter, Cynthia, was alone in the apartment, and she died in the fire. The Fire Chief initially blamed the fire on an electric fan, but then asked Assistant State Fire Marshal Robert Cryer to investigate further. Cryer arrived at the apartment at 6:30 a.m. and spent most of the day investigating. The next day, Cryer told the prosecutor's office that he believed that the fire had resulted from arson.

Cryer based his conclusion solely on his belief that some of the burn patterns he found at the apartment demonstrated the presence of accelerants. He found no empty containers of flammable liquids. From the apartment, Cryer took nothing that the Ohio Arson Crime Laboratory ("State Arson Lab") could test for the presence of accelerants, nor did he order the scene secured at the end of his June 30 investigation. Instead, Cryer authorized the building's owners to clean the

apartment. The owners discarded the damaged living room carpet, which ended up at a local garbage dump.

The police investigation quickly focused on Richey. On the morning of June 30, within hours of the fire, he was interviewed by the police chief. On July 1, Richey was arrested for arson and gave a tape-recorded interview to the police, who were joined by Cryer and a prosecutor. Although acknowledging that he was intoxicated and therefore did not remember much of what happened early in the day on June 30, Richey denied starting the fire. Because gasoline and paint thinner were stored in an unlocked greenhouse across the street from the apartment building, the State theorized that Richey had obtained these materials from that greenhouse. However, the owner of the greenhouse was unable to determine whether any gasoline or paint thinner was missing, and Cryer took none of the accelerants from the greenhouse to compare with the materials at the fire scene.

On July 10, 1986, a grand jury charged Richey with: (1) aggravated felony murder; (2) aggravated arson; (3) breaking and entering; (4) involuntary manslaughter during the commission of a felony; and (5) child endangerment. The court appointed two attorneys to defend Richey against the charges, to which he pled not guilty, not guilty by reason of insanity, and not competent to stand trial by reason of insanity. The trial court ordered Richey to undergo a psychiatric examination, and he eventually withdrew his insanity plea and was adjudged competent to stand trial. In late 1986, Richey waived his right to a trial by jury, and agreed to be tried before a three-judge panel, under Ohio Revised Code Section 2945.06. The heart of the indictment against Richey was the charge of aggravated felony murder, which, if proven, made him eligible for the death penalty. According to the statute in effect at the time, an aggravated felony murderer must have "specifically intended to cause the death of the person killed[--]the prosecution must prove

the specific intent of the person to have caused the death by proof beyond a reasonable doubt." OHIO REV. CODE ANN. § 2903.01(D). The State concedes that it presented no evidence that Richey specifically intended to kill Cynthia Collins. Rather, the State hypothesized that Richey set fire to the Collins apartment so that he could kill his ex-lover, Candy Barchet, and her new boyfriend, Mike Nichols, who were spending the night together in the apartment below. The testimony at trial established that Barchet moved into the building on June 15, and that within a few days she and Richey progressed to a sexual relationship. Apparently, Richey frequently told Barchet that he loved her and would kill any other men she dated. John Butler testified that on June 24, he had sex with Barchet, and that when Richey learned of this encounter, he confronted Butler while carrying a knife. Right after the confrontation, Richey broke his hand by punching a door.

On June 29, Richey attended a party hosted by Peggy Villearreal, who lived next door to Hope Collins. Barchet brought Nichols to the party, kissed him in plain view of the other guests, told Richey that she wanted to date Nichols, and later took Nichols home with her. Several witnesses testified that Richey - who was intoxicated that night - became upset upon learning of Barchet's new boyfriend. One witness testified that Richey proclaimed that "if I can't have Barchet, nobody else can." Three other witnesses testified that Richey told them that Building A, the subsection in which Barchet resided, "was going to burn" that night.

Hope Collins testified that around 2:00 a.m., as the party began to wane, Richey asked her if he could sleep on her sofa that night, but she refused. Collins testified that Richey offered to steal some flowers for her from the greenhouse located across the street, but she declined his gesture. Shortly after 3:00 a.m., a friend of Collins drove up to the building and asked Collins to go out with him that night. Collins told

him that she did not have a babysitter. According to Collins, Richey volunteered to "keep an eye" on Cynthia, as long as he could sleep on Collins's couch. Collins testified that at 3:30 a.m., with Cynthia in Richey's care, she went out with her friend.

The fire started at about 4:15 a.m. Five eyewitnesses testified that after Richey emerged onto the scene: (1) he repeatedly hollered that "there's a baby in the house"; (2) he repeatedly attempted to enter the burning apartment building to save Cynthia's life; (3) he proceeded so far into the building that "he came back out coughing and spitting up"; and (4) and police eventually had to restrain him from entering the building. The Assistant Fire Chief stated that Richey's efforts to save Cynthia "constituted that of a person who completely was disregarding his own safety." Conversely, another tenant testified that upon viewing the fire, Richey boasted that "it looks like I did a helluva good job, don't it."

As part of its investigation, the State eventually retrieved six samples of debris remaining from the fire. Several of those samples came from the carpet that had first found its way into the garbage dump. On the afternoon of July 1, nearly two days after the fire broke out, the Deputy Sheriff retrieved the carpet from the dump. One piece of carpet was recovered from atop the garbage pile, and another was partially covered by trash. Once removed, the carpet was placed in the sheriff's parking lot. The carpet stayed in the parking lot - located no more than forty feet away from gasoline pumps - for three weeks, before it was finally taken to the State Arson Lab for testing. Similarly, a wood chip sample was not removed from Collins's apartment for testing until July 17, nearly three weeks after the fire.

These samples were analyzed by the State Arson Lab using gas chromatograms, which one of the State's forensic

chemists, Dan Gelfius, described at trial as "scientific instrumentation that allows the differential migration of the components of hydrocarbons to separate and to give . . . a pattern similar to the identification of fingerprints." Basing his conclusions on a method of analyzing the chromatograms that has neither been published nor peer-reviewed, Gelfius testified that both a sample of carpet from Collins's living room and a sample of wood from her balcony contained paint thinner, and that another sample of the living room carpet contained gasoline. The State detected no traces of accelerants on the other three samples from the apartment, the clothing and boots that Richey wore on June 29, or the bandage that covered his broken hand.

Gelfius was unaware of the carpet's removal to the local garbage dump and then to the sheriff's parking lot until he arrived to testify at trial. He has since acknowledged that, had he known about these detours, he would have been "very concerned" and "probably work wouldn't have been done on this case." The missing links in the carpet's chain of custody did not disturb Assistant State Fire Marshal Cryer, because he believed that the same paint thinner was found on both the living room carpet and the balcony. However, this turned out to be false: the Chief of the State Arson Lab, Mohammed Gohar, and Gelfius have since acknowledged that the State Arson Lab did not - and would not have even been able to - "match" the paint thinner purportedly found on the deck to the paint thinner purportedly found on the carpet.

Yet the State's scientific evidence went unchallenged at trial. Richey's forensic expert for the trial was L. Gregory DuBois of the firm CTL Engineering. Richey's trial counsel acknowledged that DuBois "was not recommended by any civil defense attorney or any other attorney." Instead, trial counsel learned about DuBois's firm through an advertisement that he received in the mail. Trial counsel stated that he "called CTL because they advertised [that] they

had experts in arson investigation, and [DuBois] was the one [that CTL] sent up." CTL sent DuBois, whose formal education was limited to a bachelor's degree in metallurgical engineering and a partially completed stint in business school. Although accredited in Ohio as an accident reconstructionist, he primarily performed "vehicle accident reconstructions." He had no accreditations in arson or fire investigations. Moreover, although DuBois was a member of the American Society for Testing Materials, the membership was solely through CTL; DuBois had no individual membership in the group, and he had attended no "seminars or other educational venues sponsored by the ASTM." Similarly, although DuBois was a member of the International Association of Arson Investigators ("IAAI"), his involvement was limited to receiving quarterly publications in the mail, and at the time he was hired by Richey's trial counsel, he had attended no IAAI seminars on fire investigation. Finally, although DuBois had participated in numerous arson investigations with CTL, he did so in a supporting role: "typically, [he] would review the results [of the investigations] with the chemist who performed the analyses."

DuBois's resume, which trial counsel had received, indicated that he worked as a metallurgical engineer, and that his arson-related training consisted of only two two-day courses, neither of which involved the subject of burn patterns. Both courses were taught by personnel from the State Arson Lab, whose inculpatory conclusions DuBois was hired to review. Moreover, DuBois admitted that he admired Mohamed Gohar--Chief of the State Arson Lab, who oversaw the testing in Richey's case--and he believed that Gohar stayed at the forefront of technology and was "quite authoritative in his field." At the time he was hired, DuBois believed that the state fire marshal's office did a better job of fire sample analysis than his own employer did.

Although Richey's trial counsel had been appointed on July 14, 1986, and received the State Arson Lab reports on August 5, 1986, he did not meet with DuBois (or any other potential expert) until September 11, 1986. At that meeting, according to DuBois, trial counsel told him that "he was interested in keeping costs to a minimum, ... and he told [DuBois] that he wanted about ten hours in the initial investigation." Trial counsel did not ask DuBois what type of work was necessary to investigate the fire; according to DuBois, "the ten hours was given to me by [trial counsel] as an implied budget, that this was what he could afford in this particular case to have the time spent, and he wanted to know what could I do for ten hours worth of time." It was not until November 18, 1986 that trial counsel contacted DuBois again, and in the interim DuBois did no further work on the case. By this point, despite having had no idea what conclusions DuBois would draw, trial counsel had already put his name on the witness list.

When his investigation finally began, DuBois contacted Gohar. The two "worked together, went through each chromatogram, and [DuBois] had [Gohar] show [him] which standard he used and what result he got, and which sample matched which chromatogram." DuBois conducted no independent testing of the samples, nor did he interview Cryer or otherwise attempt to analyze the growth and spread of the fire. Trial counsel, however, "wasn't aware that [DuBois] had not done any [independent testing] until well after the trial." Although trial counsel never asked DuBois to perform any independent testing, he "assumed [DuBois] would do more than just look at the reports of Cryer." Furthermore, when DuBois presented his findings to trial counsel, counsel did not ask him what his basis was for those findings. DuBois, who submitted no written report to trial counsel, confirmed that counsel "was surprisingly nonargumentative with me [and] didn't challenge me on what